UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WATERSTONE MORTGAGE CORPORATION	)	
	)	
and	)	Case No. 30-CA-073190
	)	
PAMELA HERRINGTON	)	

RESPONDENT WATERSTONE MORTGAGE CORPORATION'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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Now comes Respondent Waterstone Mortgage Corporation (hereinafter, "Waterstone"), by and through its undersigned counsel, and hereby submits this brief in opposition to the charges set forth in the Amended Complaint brought by the Acting General Counsel of the National Labor Relations Board (hereinafter, "General Counsel") alleging that Waterstone has violated the National Labor Relations Act (hereinafter, "NLRA"). Waterstone denies any and all such allegations generally and specifically and, in further support thereof, Waterstone states as follows:

FACTUAL BACKGROUND

By way of background, this matter arises from Waterstone's attempt to enforce an arbitration provision contained in an employment agreement voluntarily executed by Ms. Herrington during the course of her employment. In response, Ms. Herrington contended that the arbitration provision and Waterstone's attempted enforcement thereof constituted an unfair labor practice (hereinafter, "the Charge"). Following a ruling by the Western District of Wisconsin in which the Court ordered Ms. Herrington's wage and hour claims to proceed in an arbitration that other employees of Waterstone may join, a copy of which is attached to the Stipulation of Facts (hereinafter, "Stipulation") as Exhibit N, and the filing of a Complaint by the NLRB, a copy of which is attached to the Stipulation as Exhibit B, Waterstone sought to refine the arbitration provision contained in its Loan Officer Employment Agreement (hereinafter, "Employment Agreement"), a copy of which is attached to the Stipulation as Exhibit K. As a result of its efforts to balance compliance with the NLRB's interpretation of the National Labor Relations Act ("NLRA") and the pending Herrington litigation, Waterstone revised the arbitration provision contained in the Employment Agreement and distributed the proposed Amendment (hereinafter, "the Amendment") to its loan officer employees, the only employees

subject to the Employment Agreement. A copy of the correspondence disseminating the Amendment is attached to the Stipulation as Exhibit R, and a copy of the Amendment is attached to the Stipulation as Exhibit S.

In short, the Amendment provides two options to Waterstone's loan officer employees (hereinafter, "employees"): 1) employees could elect to proceed in arbitration subject to the rules promulgated by JAMS in their home state, or 2) employees could elect to proceed in the United States District Court for the Western District of Wisconsin, the Wisconsin state court in Waukesha County if subject matter jurisdiction is lacking, or any other forum directed by the aforementioned courts. See, Ex. S. Neither option precludes employees from joining together to pursue claims against Waterstone.

Moreover, Waterstone did not mandate that the employees complete the Amendment as a condition of employment; however, at the urging of the NLRB following the Charge filed by Ms. Herrington, Waterstone is attempting to eliminate the continued use of the arbitration provision contained in the original Employment Agreement. To put it clearly, any request made by an employee to be subject to a provision other than the options set forth in the Amendment would be considered on a case by case basis and the potential for accommodations exist.

However, it is the stated intent of Waterstone to eliminate the continued use of the language that the NLRB has objected to contained in the Employment Agreement. While Waterstone believes that, for the reasons set forth herein, the arbitration provision in the original Employment Agreement is valid, Waterstone has endeavored to consider the NLRB's position and modify its Employment Agreement in a manner that is consistent with D.R. Horton, Inc., 357 NLRB No. 184 (2012), existing Supreme Court precedent, and the Order issued by the U.S. District Court for the Western District of Wisconsin.

Furthermore, contrary to the assertions contained in the Amended Charge, employees are not prohibited from joining the litigation/arbitration initiated by Ms. Herrington. Option B allows employees to bring claims against Waterstone in specified courts or in "any other forum to the extent it is directed by the foregoing court(s)." Id. Insofar as one of the specified courts, the U.S. District Court for the Western District of Wisconsin, has already directed that the wage and hour claims initiated by Ms. Herrington be brought in arbitration and that any employee must be allowed to join Ms. Herrington in arbitration, it is clear that Waterstone has not precluded its current employees from joining Ms. Herrington in arbitration. See, Ex. N. While Ms. Herrington has made numerous allegations as to the character of Waterstone and its counsel, it is beyond cavil to think that Waterstone or its counsel would draft and disseminate an Amendment that would blatantly violate the Order of a federal judge.

ARGUMENT

I. The Amendment Does Not Violate the NLRA

The key issue in this matter is whether the Amendment violates the NLRA. For the reasons set forth herein, the Amendment is not unlawful because the existence of an option itself is not unlawful nor in violation of the NLRA. Similarly, neither Option A nor Option B standing alone constitute a violation of the NLRA. Furthermore, as explained in detail below, the law set forth by the Board in D.R. Horton is simply not good law.

a. The Existence of an Employee Option is Consistent with the NLRA and the FLSA

At the onset, assuming *arguendo* the validity of the General Counsel's assessment of the law in D.R. Horton, the Amendment at issue here is distinguishable from the arbitration provision at issue in D.R. Horton on several grounds. While, as set forth in more detail below, both Option A and Option B allow for employees to join together their substantive claims against

Waterstone unlike the collective action waiver at issue in D.R. Horton, the Amendment also provides employees with the choice between two options. The mere existence of a choice ensures compliance with the view of the NLRA set forth in D.R. Horton.

In this regard, neither D.R. Horton nor the NLRA sets forth any prohibition against providing employees the ability to select one of two options for jointly proceeding with claims against an employer. In fact, the contrary is true, as the Board made clear:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA rights to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.

D.R. Horton, 357 NLRB No. 184 at 12 (italics in original). Simply put, the Board has ruled that collective action waivers in arbitration agreements are permissible if a judicial forum for class and collective claims remains. While, for the reasons set forth below, Waterstone believes that Option A preserves all of its employees' substantive rights under the NLRA to join together in a lawsuit against Waterstone, the Amendment, through the inclusion of Option B, actually follows the guideline set forth by the Board by providing a judicial forum for class and collective claims. Simply put, the Board in D.R. Horton envisioned and even suggested an arbitration provision that could limit arbitration to an individual basis while allowing judicial access with no limitations with respect to a potential class. Here, Waterstone has exceeded this standard by not only providing unfettered class access to the Courts and any arbitration or other forum directed by the courts (Option B), but also by providing the ability to join with other employees in arbitration (Option A).

Importantly, in suggesting this approach, the Board implicitly recognized that each individual employee must make a decision as to whether he or she would prefer to pursue claims collectively or individually (as set forth below, this is in fact a requirement of the Fair Labor Standards Act). Therefore, given that the Board has suggested this dichotomy, it cannot possibly be a violation of the NLRA to allow employees the choice between joint arbitration by joinder and intervention and unlimited access to the courts and any forum directed by a court. The fact that employees have been asked to make this choice at the time of executing the Amendment, as opposed to making the decision on a claim by claim basis, is not an issue that invokes the right to protected concerted activity as set forth in the NLRA. Inasmuch as the Board has recognized that each individual employee has the right to make a choice as to how he or she wants to proceed, there is no basis to conclude that the timing of the choice could constitute the loss of a substantive NLRA right. Indeed, the Board would certainly not suggest the waiver of such a substantive right as an option.

Similarly, the fact that the employee has a choice also distinguishes the Amendment from the facts of D.R. Horton. In D.R. Horton, the Board relied heavily on the fact that the employer required individuals to execute a collective action waiver contained in an arbitration provision as a condition of employment. Specifically, the Board stated, "we hold only that employers may not **compel** employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." Id. (emphasis added, italics in original). In reaching this conclusion, the Board found that the employer "began to **require** each new and current employee to execute a Mutual Arbitration Agreement." Id. at 1 (emphasis added). The Board further found that the arbitration provision "was **imposed on all employees as a condition of hiring or continued employment** by the Respondent, and it is properly treated as

the Board treats other unilaterally implemented workplace rules . . . the Board thus applies the test set forth in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)." Id. at 4 (emphasis added). In determining to apply the test from Lutheran Heritage Village-Livonia, the Board also relied upon a prior decision in which it found "unlawful employer's conditioning employment on the signing of individual agreements not to engage in self-organization and collective bargaining." Id. at 4 (*citing*, Adel Clay Products Co., 44 NLRB 386, 396 (1942) enfd. 134 F.2d 342 (8th Cir. 1943)). In applying this test, the Board described the issue it was analyzing as, "whether employees can be required, **as a condition of employment**, to enter into an agreement waiving their rights under the NLRA." Id. at 10 (emphasis added).

Along these same lines, the law is quite clear that, with respect to claims under the FLSA, the employee must affirmatively opt to assert a claim. "It is clear that Congress labored to create an opt-in scheme when it created Section 216(b) specifically to alleviate the fear that absent individuals would not have their rights litigated without their input or knowledge." Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006). As the statute itself explains in plain language, "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 USCS § 216. In interpreting this statute, the Seventh Circuit noted, "The statute is unambiguous: **if you haven't given your written consent to join the suit, or if you have but it hasn't been filed with the court, you're not a party**. It makes no difference that you are named in the complaint, for you might have been named without your consent. The rule requiring written, filed consent is important because a party is bound by whatever judgment is eventually entered in the case, and if he is distrustful of the capacity of the 'class' counsel to win a judgment he won't consent to join the suit. We are inclined to interpret the statute literally. No

appellate decision does otherwise." Harkins v. Riverboat Servs., 385 F.3d 1099, 1101 (7th Cir. 2004) (emphasis added).

The reasons supporting this conclusion were recently explained by the Third Circuit, which had occasion to consider this history in detail, noting:

> These statements, taken together with the historical context, elucidate the congressional purpose behind § 216(b). First, the primary concern of Congress was "representative" actions as Senator Donnell defined them, and of the sort that had dominated the portal-to-portal litigation—that is, instances where union leaders allegedly "stirred up" litigation without a personal stake in the case. As a contemporary commentator stated, "The banning of representative actions for unpaid wages is an obvious device to prevent the maintenance of employee suits by labor unions." Note, Fair Labor Standards Under the Portal to Portal Act, 15 U. Chi. L. Rev. 352, 360 (1948).
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> Second, Congress intended the requirement of written consent to bar plaintiffs from joining a collective action well after it had begun, particularly when the original statute of limitations had run and when those opting in would not be bound by an adverse decision. These requirements abrogated the Pentland decision and foreclosed the possibility of one-way intervention in FLSA actions. See Fair Labor Standards Under the Portal to Portal Act, supra, at 360 & n.60.
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> In sum, the enforcement scheme in the Portal-to-Portal Act largely codified the existing rules governing spurious class actions, with special provisions intended to redress the problem of representative actions brought by unions under earlier provisions of the FLSA and the problem of "one-way" intervention. Absent from the debates was any mention of opt-out class actions—an unsurprising fact, since the FLSA had not been interpreted to permit such suits. The FLSA did not become relevant to opt-out class actions until after the revision of Rule 23 and the creation of modern Rule 23(b)(3) in 1966. During that process, the Advisory Committee on Civil Rules disclaimed any intention for the new opt-out rule to affect 29 U.S.C. § 216(b). Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 104 (1966). The effect of this grandfathering was to convert what had been an affirmative grant beyond the limited provisions of pre-revision Rule 23 into "a limitation upon the affirmative permission for representative actions that already exists in Rule 23 of the Federal Rules of Civil

> Procedure. (That is to say, were it not for this provision of § 216(b) the representative action could be brought even without the prior consent of similarly situated employees.)" Sperling, 493 U.S. at 176 (Scalia, J., dissenting) (emphasis removed).

Knepper v. Rite Aid Corp., 675 F.3d 249, 256-257 (3d Cir. 2012). Accordingly, this law makes clear that employees unquestionably not only have the option to assert claims under the FLSA, but cannot be forced to assert these claims collectively and must make an individual determination as to whether the employee will assert the claim.

Clearly then, the Board in D.R. Horton found the fact that the collective action prohibition was a requirement of employment determinative as a matter of law. In contrast, here, there is no basis for such a finding in this matter, where employees can select Option B, which permits employees to engage in class or collective actions in courts or other forums designated by courts, or Option A, which permits arbitrations that can be joined by all employees. Given the fact that employees here are not compelled to give up any rights under the NLRA as a condition of employment, the Amendment is clearly distinguishable from the mandatory collective action prohibition in D.R. Horton. Furthermore, since D.R. Horton specifically held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation," and Waterstone has 1) not even presented any options that would constitute a waiver, and 2) presented employees with an option that permits unlimited access to the courts, D.R. Horton is distinguishable and should not control resolution of this dispute.

b. Option A is Presumptively Lawful

Option A, as set forth in the Amendment, provides that an employee shall pursue any claim against Waterstone in binding arbitration administered by JAMS Arbitration and Mediation Services ("JAMS"). See, Ex. S. Option A also provides that the employee may join or be joined by others employees in any JAMS proceeding, but that this joinder must be

accomplished through the methods provided for by Federal Rules of Civil Procedure 20 and 24. Accordingly, the only "rights" restricted by Option A are the procedural rights associated with class actions and collective actions, not the purported substantive right to act concertedly under the NLRA.

At the onset, mandatory arbitration is presumptively valid and, here, where employees are allowed to join other employees to the arbitration there can be no basis for finding a violation of the NLRA. It cannot be disputed that the NLRA does not prohibit arbitration of claims brought by employees against employers. See, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City v. Adams, 532 U.S. 105, 119 (2001); Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 91 (2000). In fact, federal policy favors arbitration. Tinder v. Pinkerton Security, 305 F.3d 728, 733 (7th Cir. 2002); see also, Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp., 916 F.2d 402, 405 (7th Cir. 1990). Specifically, the FAA "mandates enforcement of valid, written arbitration agreements," like the arbitration provision contained in the Employment Agreement and the Amendment. Tinder, 305 F.3d at 733. Furthermore, the provisions of the FAA "manifest a liberal federal policy favoring arbitration agreements." EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002). Accordingly, Option A does not violate any law by compelling employees and Waterstone to arbitrate any claims they may have against each other. Likewise, because all employees that select Option A may be joined, there is not a limitation on the "substantive" right to act concertedly that the Board relied upon in D.R. Horton.

Along the very lines set forth by the Board in D.R. Horton, it is not a violation of the NLRA for the parties to enact an arbitration provision that mandates a specific process by which other employees may be joined to a pending claim. There can be no dispute that the right to

pursue a class action or a collective action is not a substantive right protected by the NLRA. Supreme Court precedent, as well as other federal law, makes clear that the "right" to a class action pursuant to Federal Rule of Civil Procedure 23 is a procedural right, and not a substantive right. See, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S.Ct. 1431, 1443 (finding Rule 23 to be valid because it only affects procedural rights, while "it leaves the parties' legal rights and duties intact and the rules of decision unchanged"); see also, Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (stating that the "right [to class action device] is merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause.") Similarly, it is also overwhelmingly clear that the right to a collective action with respect to a claim alleging violations of the FLSA is also procedural, and not substantive. See, Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001) ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute"); Carter v. Countrywide Credit Indus., 362 F.3d 294, 298 (5th Cir. 2004) (""we reject the . . . claim that the . . . inability to proceed collectively deprives [individuals] of substantive rights available under the FLSA.") The procedural nature of the right to class or collective actions was similarly clarified by the Supreme Court in 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456, 1465 (2009). The Supreme Court held that a collective bargaining agreement that required union members to arbitrate ADEA claims was enforceable as a matter of law. The Court, relying upon its prior decision in Gilmer, explained that by submitting statutory claims to arbitration, the union was not waiving any "substantive right[s]." Id.

So, unsurprisingly, the law is clear that the process by which employees join together to pursue a claim against an employer is a procedural issue, not a substantive issue. Therefore,

even assuming that there is a substantive right to join together in litigation, that purportedly substantive right would not be violated by the limitation of the procedures available to employees to join together to exercise that "substantive" right. If the NLRA does provide a right to employees to join their claims together, the procedure by which employees exercise these rights cannot be substantive as long as the ultimate ability to attempt to join claims together is available.

This is an important note as the Board has previously drawn a distinction between those employees that actively seek to pursue a claim and those employees that do not. As the Board has stated, the protections available under the NLRA do not apply to those anonymous employees that could become class members, but rather the protections belong to "employees **who join together to bring** employment-related claims on a classwide or collective basis in court or before an arbitrator." D.R. Horton, 357 NLRB No. 184 at p. 3 (emphasis added). Likewise, the Board has also explained, "To be protected by Section 7, activity must be concerted, or 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'" Id., *quoting*, Meyers Industries, 281 NLRB, 882, 885 (1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987). As explained by the D.C. Circuit, the Board has long recognized that an employee's action is "concerted" only if it was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Prill, 835 F.2d at 1483. The D.C. Circuit continued, "concerted action cannot be imputed from the object of the action." Id. "In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." Id. Accordingly, by the Board's own statements, it is clear that only those individuals that seek to engage in protected

concerted activity are protected by the NLRA and that a class action does not typically or necessarily involve concerted protected activity. Option A allows those employees that seek to enforce substantive rights against Waterstone to do so jointly, in conformity with the Board's statement with respect to the NLRA.

Similarly, in the context of protections for union organizing under Section 7 of the NLRA, the protections are not so expansive as to contain no procedural limitations on the substantive right to organize. For example, the Supreme Court has held that employees do not have an unfettered right to the distribution of union organizing materials in the work place. See, Lechmere, Inc. v. NLRB, 502 U.S. 527, 533 (1992) ("As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property.) Similarly, the Supreme Court has held that employers need not assist employees in their efforts to organize and engage in protected concerted activity. See, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) ("The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.") This law is analogous and applicable here insofar as it demonstrates that the NLRA protects the substantive right to protected concerted activity, not any specific procedure by which this may be accomplished. As long as the substantive right of employees to join together in protected concerted activity is preserved, the procedural issues do not constitute violations of the NLRA.

Moreover, and as set forth in greater detail above, the Board has specifically, held, "We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA rights to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." Id. at p. 12 Accordingly, because Option B leaves open a judicial forum (as well as the currently

pending arbitration forum) for resolution of class and collective claims, the employees' NLRA rights are preserved. Id. at p. 12

c. Option B is Consistent with the Requirements of the NLRA

There is no basis upon which it could be concluded that Option B interferes with any of the employees' NLRA rights. Option B does not prohibit or limit the shape or form of a class of employees seeking to pursue a claim against Waterstone. Instead, Option B operates merely as a forum selection clause. Such clauses do not limit the ability of employees to join their claims together and are presumptively valid. IFC Credit Corp. v. Aliano Bros. Gen. Contrs., Inc., 437 F.3d 606, 610 (7th Cir. 2006) *citing* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). While Ms. Herrington has alleged that it prohibits such activity by failing to permit employees from joining her arbitration, as set forth herein, she is clearly erroneous.

d. Applicable Federal Law Weighs Against Enforcement of D.R. Horton

As an additional note, there is significant law, including Supreme Court precedent, that compels that conclusion that the Board's decision in D.R. Horton is both procedurally and substantively defective. Simply put, in deciding D.R. Horton, the Board may well have lacked appropriate authority to issue its decision and, likewise, issued a decision that runs counter to established Supreme Court precedent.

First, with respect to the procedural validity of the Board's decision, there is a problematic defect. That is, at the time D.R. Horton was decided, the NLRB lacked a quorum. Specifically, in January 2012 the President's recess appointments were made without Senate approval making these appointments invalid and causing the number of sitting Board members to fall below the requisite amount for a quorum. See, Nat'l Ass'n of Manuf. v. NLRB, 2012 U.S. Dist. LEXIS 27290 (D.D.C. 2012); see also, Chamber of Commerce v. NLRB, 2012 U.S. Dist.

LEXIS 66626, *30 (D.D.C. 2012). As a result, the Board was not operating with the appropriate minimum number of members and, therefore, its rulings were not procedurally adequate. Simply put, "The NLRB is a 'creature of statute' and possesses only that power that has been allocated to it by Congress . . . As the final rule was promulgated without the requisite quorum and thus in excess of that authority, it must be set aside. " Id. For these same reasons, the Board's rule in D.R. Horton should be set aside and should not govern.

Second, as it pertains to the substantive defects in the Board's opinion, D.R. Horton directly contradicts existing Supreme Court precedent and, therefore, cannot be considered valid law.[1] To wit, the Supreme Court, in AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011), addressed California case law that prohibited class-action waivers in an arbitration clause of an adhesion contract as unconscionable. In striking down this law, the Supreme Court began by explaining, "**The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.**" Id. at 1748 (internal quotations omitted, emphasis added). The Court continued, "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." Id. at 1749, *citing*, 14 Penn Plaza, *supra*, 129 S. Ct.

[1] Similarly, it is important to note that the two Federal District Courts that specifically addressed this issue prior to D.R. Horton have concluded that the NLRA does not prohibit the waiver of an employee's right to pursue an FLSA claim in a collective action. See, Slawienski v. Nephron Pharmaceutical Corp., 2010 U.S. Dist. LEXIS 130365 (N.D.Ga. 2010) and Grabowski v. C.H. Robinson Company, 2011 U.S. Dist LEXIS 105680 (S.D.Cal. 2011). In interpreting the NLRA in the context of an FLSA collective action, the Northern District of Georgia and the Southern District of California both reach a different conclusion than that of the Board. As the District Courts have explained, "[I]t is apparent from the face of the complaint that plaintiff and the other opt-ins are not advocating regarding the terms and conditions of their employment. Rather, plaintiffs are pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages." Grabowski, 2011 U.S. Dist LEXIS 105680 at 19, *quoting*, Slawienski, 2010 U.S. Dist. LEXIS 130365 at 5. See also, Grabowski, 2011 U.S. Dist LEXIS 105680 at 20 ("Plaintiff, who resigned from his employment with Defendants six months before filing suit, has failed to show that this suit implicates the 'mutual aid or protection' clause"). This was not an issue considered by the NLRB in D.R. Horton, especially in the context of addressing claims brought by former employees, which is the case here.

1456. With the importance of arbitration under the FAA and the sanctity of private contracts in mind, the Court held, "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." Id. at 1752. As a result, the Court specifically affirmed the inclusion of collective action prohibitions in arbitration provisions. See also, Gilmer, 500 U.S. at 26 (holding that arbitration agreements should be enforced as written unless "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). The preclusive nature of these holdings is evidence, as "Concepcion (which is binding authority) made no exception for employment-related disputes." Iskanian v. CLS Transportation L.A. LLC, 2012 Cal.App. LEXIS 650, *21 (Cal. Ct. App. 2012). The same is also true of the Supreme Court's recent opinion in CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012), which came after D.R. Horton. In CompuCredit, the Supreme Court reaffirmed the "liberal federal policy favoring arbitration agreements" and also that this "is the case even when the claims at issue are federal statutory claims." Id. at 669. See also, Nat'l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 634 F.3d 187, 200 (2d Cir. 2011) ("Stolt-Nielsen plainly precludes us from ordering class-wide arbitration").

Similarly, the availability of class arbitration was specifically addressed by the Supreme Court in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010). In Stolt-Nielsen, the parties entered into a contract that provided for arbitration of "any dispute arising from the making, performance or termination of [the agreement]," but which was silent on the question of class arbitration. Id. at 1765. The Supreme Court reversed the Second Circuit and ruled that the arbitration panel had erred by ordering class arbitration in the absence of an express agreement to engage in class arbitration, noting that under the Federal Arbitration Act (hereinafter, "FAA"), arbitration "is a matter of consent, not coercion" and that private agreements must be "enforced

according to their terms." Id. at 1773. The Court continued by noting that because private dispute resolution is a matter of consent, "**a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so**." Id. at 1775 (italics emphasis in original; bold emphasis added).

The Court continued, "In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached 'no agreement' on that issue . . . The panel's conclusion is fundamentally at war with the foundational FAA principle that **arbitration is a matter of consent**." Id. at 1775 (emphasis added). As it pertains directly to class arbitration, the Supreme Court stated, "An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." Id. at 1775. The Court then concluded that where there is no agreement to arbitrate on a class-wide basis, parties could not be compelled to submit their dispute to class arbitration. Id. at 1776. Absent from the Supreme Court's opinion is any reference to a statutory basis for class arbitration. Instead of explaining that grounds for inferring an agreement to participate in a class arbitration may exist in law, the Supreme Court eschewed the possibility and, instead, held that class arbitration is a matter of contract and mutual consent only.

For these same reasons, the majority of federal courts that have considered the application of D.R. Horton have rejected it. See, Morvant v. P.F. Chang's China Bistro, Inc., 2012 U.S. Dist. LEXIS 63985, *33 (N.D. Cal. 2012) (finding that the "reasoning [of D.R. Horton] does not overcome the direct, controlling authority holding that arbitration agreements,

including class action waivers contained therein, must be enforced according to their terms"); Jasso v. Money Mart Express, Inc., 2012 U.S. Dist. LEXIS 52538, *24 - 26 (N.D. Cal. 2012) (holding that Supreme Court precedent articulating a strong policy in favor of enforcement of arbitration agreements requires the enforcement of class waiver provisions); Palmer v. Convergys Corp., 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. 2012) ("The Court reviewed the NLRB decision and finds that it does not meaningfully apply to the facts of the present case"); LaVoice v. UBS Fin. Servs., 2012 U.S. Dist. LEXIS 5277, 19-20 (S.D.N.Y. 2012) (rejecting D.R. Horton and concluding that requiring classwide arbitration in inconsistent with Concepcion); Luciana De Oliveira v. Citicorp N. Am., Inc., 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. 2012) (applying 11th Circuit precedent Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005) and Concepcion and rejecting D.R. Horton); Spears v. Mid-America Waffles, Inc., 2012 U.S. Dist. LEXIS 90902, *6 (D.Kan. 2012) (rejecting D.R. Horton and holding that, based on Concepcion, "arbitration agreements are enforceable even when they prohibit the use of a class action"). See, Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 222 (3rd Cir. 2012) ("Stolt-Nielsen established a default rule under the Federal Arbitration Act . . . Absent a contractual basis for finding that the parties agreed to class arbitration, an arbitration award ordering that procedure exceeds the arbitrator's powers and will be subject to vacatur"); In re Am. Express Merchants' Litig., 634 F.3d at 200.

Where a ruling made by the Board conflicts with a federal statute, such as the FAA, and Supreme Court precedent, it is without question that the Board's ruling should be struck down. See generally, Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942); NLRB v. Bildisco and Bildisco, 465 U.S. 513 (1984); Hoffman Plastic Compounds, Inc. NLRB, 535 U.S. 137 (2002); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984); Connell Construction Co. v. Plumbers, 421

U.S. 616, 626 (1975). Here, for the reasons set forth by the Supreme Court and other federal courts in the preceding paragraphs, the Board's decision in D.R. Horton contradicts the clear mandate of the FAA and the related federal policy in favor of enforcing arbitration agreements as drafted, even in the employment context (and, as set forth in Section I.a. above, also contradicts the clear mandate of the FLSA). In contrast to the specific commands of the FAA and the Supreme Court, nothing in the NLRA expressly creates a substantive right for employees to initiate class actions, nor is there any basis in the legislative history of the NLRA to reach this conclusion. As a result, the Board's interpretation of the NLRA, as set forth in D.R. Horton must be rejected.

II. Participation in Ms. Herrington's Arbitration is Not Precluded by the Amendment

As an additional note, it is without question that those employees that execute the Amendment still have the ability to join Ms. Herrington in her arbitration. As set forth above, the entire premise upon which an allegation of undue influence not to participate in Ms. Herrington's arbitration is unfounded. Specifically, Option B permits employees to join Ms. Herrington in arbitration. To wit:

> 1. Option B provides that employees electing this option may bring claims in "any other forum to the extent it is directed by the foregoing court(s)." See, Ex. S.
>
> 2. The U.S. District Court for the Western District of Wisconsin, which is one of the "foregoing court(s)," has directed that wage and hour claims brought by other employees must be permitted to be joined to Ms. Herrington's pending claim in arbitration. See, Ex. N.
>
> 3. Therefore, Ms. Herrington's arbitration proceeding in AAA is a forum that has been "directed by the foregoing court(s)." See, Exhibits N and S.

Accordingly, Waterstone has not precluded employees from joining Ms. Herrington's arbitration.

Moreover, the statement contained in Mr. Egenhoefer's cover letter (Ex. R) is not undue and unlawful pressure on employees to preclude participation in Ms. Herrington's arbitration matter. As is evident from the cover letter, Mr. Egenhoefer does not suggest that employees should favor one option over the other. While Waterstone expected the General Counsel to be pleased with the efforts Waterstone has made to eliminate use of the existing Employment Agreement and has made an effort to eliminate an arbitration provision the NLRB claims violates employees' rights under the NLRA, Waterstone has not forced any agreement upon employees that would prohibit employees from joining Ms. Herrington's arbitration.[2]

Furthermore, Waterstone, through Mr. Egenhoefer's cover letter, sought to make employees aware of the fact that the choice of an option could have an impact on the employees' ability to join Ms. Herrington. This notice was included in the cover letter in order to comply with the applicable law that requires such disclosures as set forth by the same judge that ordered Ms. Herrington's claims to arbitration. See, Sjoblom v. Charter Communications, LLC, 2007 U.S. Dist. LEXIS 94829, *9 - 10 (W.D.Wisc. 2007) (finding defendants' conduct improper because "it did not notify them that they might be entitled to become a part of the lawsuit").

III. The Amendment is Intended to Eliminate the Continued Use of the Prior Arbitration Provision

The Amendment has been implemented in order to discontinue the use of the arbitration provision contained in the existing Employment Agreement. First, Mr. Egenhoefer's cover letter accompanying the Amendment does not make any reference to employees maintaining the arbitration provision contained in the existing Employment Agreement. *See*, Ex. R. It does not

[2] Again, it is worth noting that Ms. Herrington's Amended Charge (Ex. F to the Stipulation), which complains of the elimination of the existing Employment Agreement, is wholly at odds with her initial Charge (Ex. A to the Stipulation), which seeks an injunction against the use of the existing Employment Agreement.

so state because the NLRB has pressured Waterstone into engaging in efforts to discontinue the use of the existing Employment Agreement.

In addition, and as set forth above, any request made by an employee to be subject to a provision other than the options set forth in the Amendment would be considered on a case by case basis and the potential for accommodations exist. However, at the adamant insistence and pressure applied by Ms. Herrington and the General Counsel, it is the stated intent of Waterstone to eliminate the continued use of the existing Employment Agreement. On this point, and perhaps most importantly, Waterstone is in the process of confirming that there are no longer any employees of Waterstone still subject to the arbitration provision contained in the Employment Agreement (except as ordered by the Arbitrator).

However, should the Board seek to apply the NLRA to determine whether the arbitration provision contained in the Employment Agreement is also unlawful, such a conclusion would be inappropriate for the reasons set forth above in great detail. *See*, Section I. a. and d.

IV. Injunctive Relief is Not Appropriate

In the Amended Complaint, General Counsel also seeks temporary injunctive relief pursuant to Section 10(j) of the NLRA. The Seventh Circuit has established guidelines pertinent to attempts to obtain injunctive relief under 29 U.S.C. §160(j). To wit:

> The court looks to the same factors to which it looks in other contexts when deciding whether to grant injunctive relief: the lack of an adequate remedy at law, the balance of potential harms posed by the denial or grant of interim relief, the public interest, and the petitioner's likelihood of success on the merits of its complaint. The Regional Director is entitled to interim relief when: (1) the Director has no adequate remedy at law; (2) the labor effort would face irreparable harm with out interim relief, and the prospect of that harm outweighs any harm posed to the employer by the proposed injunction; (3) "public harm" would occur in the absence of interim relief; (4) the Director has a reasonable likelihood of prevailing on the merits of his complaint. The Director bears the

> burden of establishing the first, third and fourth of these circumstances by a preponderance of the evidence.

Lineback v. Spurlino Materials, LLC, 546 F.3d 491, 499-500 (7th Cir. 2008) (internal quotations omitted). For the reasons set forth below, a claim for injunctive relief would be inappropriate.

a. *Injunctive Relief is Unnecessary as a Remedy is Available at Law and Interim Relief is Not Necessary to Prevent "Public Harm" or to Protect the "Labor Effort"*

The first element required to establish a right to injunctive relief is that "the Director has no adequate remedy at law." Id. On its face, this element is plainly not met insofar as the validity of the Amendment as it pertains to Ms. Herrington's arbitration claim is also the subject of a lengthy motion filed by Ms. Herrington with the arbitrator in which she incorrectly argues the Amendment precludes employees from joining her claim. See, Ms. Herrington's Motion for Injunction, attached hereto as Exhibit T. In addressing this Motion, the Arbitrator determined that the Amendment does not preclude any employee from joining Ms. Herrington in arbitration because the claim for class arbitration was filed before the Amendment was disseminated. Therefore, obtaining an injunction will not serve to prevent any "public harm," another requisite element of any attempt to obtain an injunction. Lineback, 546 F.3d at 499-500.

b. *Injunctive Relief is Inappropriate Because the Charge is Without Merit*

Injunctive relief with respect to the Amendment is inappropriate insofar as Ms. Herrington's Amended Charge is without merit, and the General Counsel will not be able to satisfy the fourth element necessary to obtain injunctive relief: likely success on the merits. Id. For the reasons set forth above, the Amended Charge is without merit and therefore inappropriate grounds for injunctive relief.

c. *Pursuit of Injunctive Relief Would Usurp the Authority of the Arbitrator and Waste Judicial Resources*

In addition, it is important to note that Ms. Herrington committed to having this issue resolved by the Arbitrator inasmuch as she requested that the Arbitrator enjoin Waterstone from using the Amendment. Any attempt to seek an injunction here would be duplicative of the Arbitrator's decision, on grounds unrelated to the NLRA, not to enforce the Amendment with respect to the ability of employees to join Ms. Herrington in arbitration. This is not a case where NLRB injunctive efforts are appropriate to maintain the status quo in a place of employment; instead, Ms. Herrington's Amended Charge, which is contrary to her initial Charge, is nothing more than a litigation tactic.

WHEREFORE, Waterstone Mortgage Corporation respectfully requests that the Amended Complaint be dismissed and for such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that on this 12th day of December 2012, a copy of the foregoing Brief of Respondent was electronically filed and delivered via electronic mail to:

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